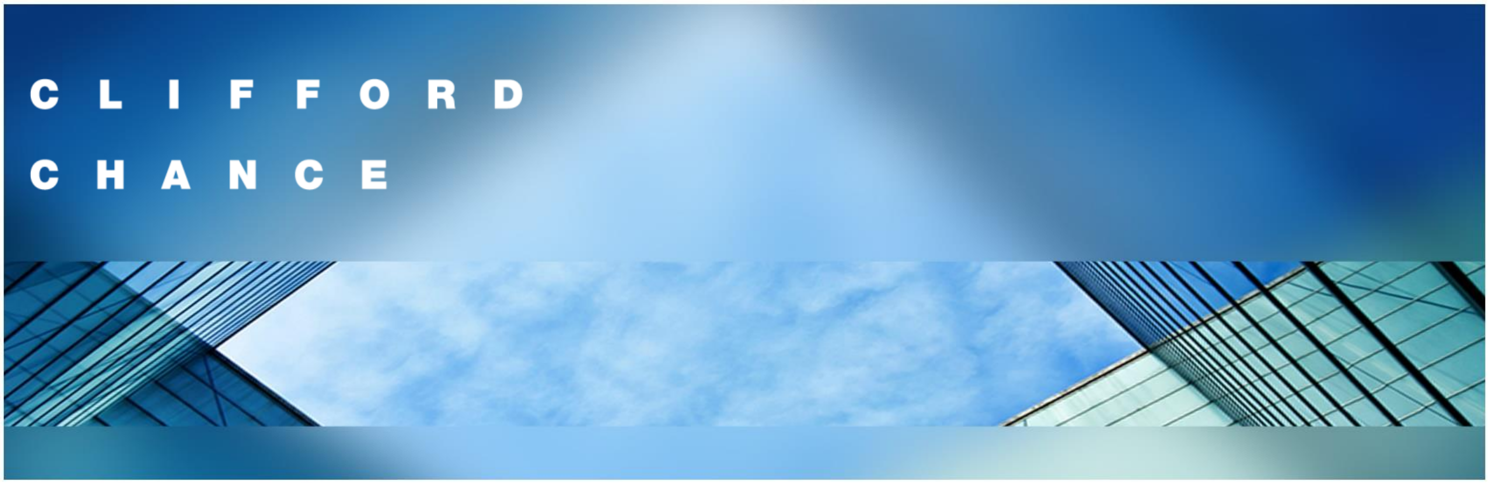

BANKRUPTCY LAWS OF EU MEMBER STATES WILL SOON BECOME MORE LIKE CHAPTER 11

Late last month, the European Union's long awaited "Directive" on business restructurings officially became effective. The Directive requires each EU member state to revise their corporate restructuring laws within the next two years to ensure that they satisfy certain EU-defined principles. Many of the principles are inspired by US Chapter 11 bankruptcy law. For example, the Directive requires member state laws to (a) permit a debtor to file for bankruptcy prior to becoming insolvent, (b) protect a debtor from certain creditor enforcement actions for a period of time, (c) provide that a debtor may remain in control of its business during its bankruptcy, (d) create enhanced protections for debtor financing, and (e) ensure that a majority of creditors in each class (not to exceed 75%) who support a restructuring proposal may bind the minority.

Importantly, the Directive does not mandate that member states adopt the US's "absolute priority rule." The US absolute priority rule, which is applicable in situations where a plan of reorganization may be 'crammed down' on a dissenting class of creditors, provides that no junior class of creditors or equity holders may receive or retain anything of value before the senior dissenting creditor class is paid in full. In contrast, it is anticipated that the new EU corollary principle that will be accepted by most member states (member states may adopt a more senior creditor-friendly principle) will only require that dissenting classes of creditors be treated at least as favorably as any other class of the same rank and more favorably than any junior class. A plan could thus be acceptable if it pays senior creditors only slightly more than junior creditors.

The changes required by the Directive are likely to be most meaningful in member states where the Directive's minimum guidelines are a substantial departure from the fundamental aspects of a member state's existing restructuring regime. For example, Germany's restructuring regime does not currently provide a preventive or pre-insolvency bankruptcy option for debtors (the only option currently available in Germany in that situation is liquidation) and the Directive will require Germany to create one. In contrast, it would appear that the Directive will have little effect on the United Kingdom's current laws, which likely satisfies the majority of the Directive's requirements.

Although a major goal of the Directive is to ensure that there is more certainty in cross-border restructurings across Europe, it remains up to each member state to convert the Directive's "principles" into a member state-specific law. As a result, the implementation of Directive principles may produce somewhat different results among the member states, likely caused by differences in each member's revisions to their existing law as well as that country's implementation of that local member-state law. Nevertheless, the overall result should be some harmonization of the principles among EU member state restructuring laws.

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Clifford Chance's European restructuring team has previously published materials that provide more details on the Directive, including on key elements and practical implications, as well as the likely impact of the Directive on the bankruptcy regimes of different member states. These can be found here, here and here.

In addition, a recent in-depth overview on European Restructuring solutions can be found here.

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